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IN THE
Supreme Court of the United States

OCTOBER TERM—1968

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No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE
LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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APPEALS FOR THE SECOND CIRCUIT

PETITION FOR RE-HEARING

The above named petitioners jointly pray for re-hearing
of the judgment of March 24, 1969*.

* By order of Mr. Justice Stewart our time for filing this petition for rehearing has been extended to May 12, 1969.

The Court has affirmed petitioners' convictions on the basis that *Katz v. United States*, 389 U. S. 347, is inapplicable to this case—"Katz is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967. Since the eavesdropping in this case occurred before that date and was consistent with pre-Katz decisions of this Court, the convictions must be Affirmed" (No. 12, slip op. (per Mr. Justice Stewart), pp. 10-11).

To arrive at the above holding in this case the Court had to resolve against petitioners each of several exceedingly debatable points, including the following points of which we wish to speak further in this petition for re-hearing.

I.

Doubtless the single most conspicuous of the notably debatable points on which the decision of March 24 in this case rests, is the point signalized in Mr. Justice Harlan's statement that "'Retroactivity' must be rethought" (no. 12, slip op., dissenting opinion of Mr. Justice Harlan, p. 2).

Surely we are not going to impose on the Court by re-hashing in this petition for re-hearing the numerous arguments in our previous lengthy briefs on the whole constitutional philosophy of "retroactivity". But, since the treatment of this subject in our previous briefs was so exceptionally full, and since it seems not unlikely that Mr. Justice Harlan's call for a re-thinking of "retroactivity" will evoke response from other Justices one of these days when "the right case" comes along, we now ask the Court to consider that there are excellent reasons for the Court to use this present case of ours as the vehicle for such a re-thinking of retroactivity. The reasons are ones

of fairness to the present petitioners, and convenience of the Court. These petitioners (their counsel, that is) did perform the task of laying before the Court a detailed analysis of the basic problems of the constitutional policy choice between retroactivity and prospectivity; we do not think this subject was briefed on a comparable scale, in prior cases, and we venture to expect that briefs in future cases will not evolve the constitutional analysis significantly further than we have already done it in our briefs. Thus, it seems fair that we should be included in any re-thinking of retroactivity, if only because our efforts to contribute to such a re-thinking give us an "equity";* and such would be consistent also with the Court's own convenience, as the Court has already familiarized itself with this case through the exhaustive review labors which the Court customarily undertakes in deciding a case on the merits.

Another factor favoring that this case be included in any re-thinking of retroactivity, is that the Government has really not yet been heard from in this case on that larger topic of a re-thinking of retroactivity. That is, in its written and oral presentations in this case the Government evidently chose to argue retroactivity along *stare decisis* lines, rather than arguing the constitutional-doctinal merits of an overall re-thinking of retroactivity. With the benefit of the background of the work already done in this case by the parties and the Court, a rehearing in which the Government would brief the larger

* As we noted in our main brief on the merits herein, p. 73, the Court recognized in *Stovall v. Denno*, 388 U. S. 293, 301, that one important factor in deciding how to handle retroactivity problems is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators).

questions would render this case ideally suited for the re-thinking endeavor with a minimum of further effort for all concerned.

Still another factor favoring our above suggestions is that at the next Term the Court will be hearing argument on the merits in *United States v. White*, no. 124. It appears that *White* must inevitably entail litigating the contemporaneous meaning of what the Court did in *Osborn v. United States*, 385 U. S. 323, decided December 12, 1966. That is, both *Osborn* and *White* involve the question of one-party—consensual “uninvited ear” electronic over-hearing, and it therefore does seem inevitable that the Court’s forthcoming full consideration of *White* must entail a likewise full exploration of the contemporaneous meaning of *Osborn* in relation to the Fourth Amendment. *White* seems bound to evoke an expression by the Court on the question of whether *Osborn* is to be read as contemporaneously having brought all electronic search of private conversation under the judicial-warrant requirements of the Fourth Amendment. In other words, *White* seems bound to decide whether *Osborn* settled this latter Fourth Amendment question a year before *Katz* did. And if *White* takes that decisional course or turns out to involve that question, would it not be only fair to allow us to participate companion-wise, so to say, in the *White* situation at the next term? Such a companion participation by us would be appropriate (and we believe valuable) through the medium of granting us a re-hearing to be considered together with the hearing of *White* on the merits.

In deciding our case on March 24 the Court did not say anything about our fundamental constitutional contention that a decision departing from prior decisions on a matter of constitutional right, stands necessarily as a declara-

tion that the prior decisions wrongly interpreted the Constitution, so that making the new decision purely prospective amounts to *denying prospectivity to the Constitution itself*. The Court did not mention this argument of ours in its opinion (nor did the Government in its briefs or oral argument). A Constitution, being the supreme form of "legislation" in a society governed by Popular Sovereignty and Constitutional Limitations, and the very essence of the operativeness of "legislation" being that its operation is *prospective*, this issue of denying prospectivity to the Constitution itself is one which the Court cannot permanently leave unconsidered and undecided. Indeed this great issue is at the heart of a re-thinking of retroactivity. And for all of the above stated reasons—as well as for our further reasons *infra*—we ought to be included in any such re-thinking.

II.

At the risk of sounding too subjective, or overly-familiar in our mode of addressing the Court, may we say that the single most painful feature for us in the Court's decision of March 24 was the denial to us of the benefit of the rule of *Linkletter v. Walker*, 381 U. S. 618, making a new overruling Fourth Amendment decision applicable to all cases then subject to direct review. The chronological circumstances in our particular case that should have commended us for retroactivity-benefit under *Katz* are exceptionally compelling. See our description of the chronological relationship between the sequences of our case and the sequences of *Katz*, in our main brief herein at pp. 52-57, 107-111. We especially now wish to emphasize one of the chronological factors that we deem peculiarly compelling, and which the Court did not mention in its decision of March 24. We refer to the Government's lengthy delay in having made disclosure of the

additional "Schipan review" electronic eavesdrop items in Georgia and Florida (*ibid.*). This delay by the Government delayed the progress of our appellate course in this case by at least six months, totally without any fault on our part (*ibid.*). Had the Government not thus unjustifiable delayed us and the reviewing Courts, our case, at the least, would have been argued and decided simultaneously with *Katz*; and indeed it is a good probability that our case would have been "the *Katz* case", and that *Katz* would have been "the *Desist* case" (in which retroactivity is not granted). We just mentioned that this Court did not refer to this anguishing chronological misfortune of ours, in the opinion of March 24; it also seems proper to mention that the Government did not treat this topic at all in its briefs or oral argument in this case. Hard as it seems to justify on sound doctrinal grounds, much less in point of simple fairness, the denial of retroactivity in a "*Desist* case" despite the extremely close chronological connection with the *Katz* sequence, it seems even harder to justify this in view of the above mentioned specific additional chronological factor of the Government's having so inexcusably delayed the progress of our appeals.

III.

The *Katz* decision (December 18, 1967) did not announce any rule of retroactivity or prospectivity; that was to come later, in our case. However, at the time *Katz* was decided the closest thing there was to an indicative guideline for *Fourth Amendment* retroactivity versus prospectivity, was the *Linkletter* principle allowing the benefit of retroactivity to all cases still subject to direct review and, *a fortiori*, to cases then actually pending in this Court on review on the merits. But then came the

March 24, 1969 decision in our case, applying the "all out" or pure prospectivity rule of *Stovall*.

Now, it seems to us that when one speaks of retroactivity in this present setting one is really speaking of *two* retroactivity aspects. *First*, there is the aspect of whether in principle *Katz* should be given any retroactivity at all, and *second* there is the question of exactly how to implement procedurally a non-retroactivity principle for *Katz*. Given the judicial attitude that retroactivity *versus* prospectivity needs to be decided *ad hoc* for each new overruling decision—rather than the attitude that each such new decision ought to apply the Constitution itself prospectively—it necessarily follows that some persons are not going to be having the benefit of retroactivity as the case-by-case process unfolds. That is, the very idea that in principle retroactivity may or may not be granted with respect to a particular new decision, negates the opposing doctrine of the prospectivity of the Constitution itself, negates the opposing doctrine that every one ought to get full retroactivity from every new decision; and we well realize this obvious fact of life in this branch of the law under the Court's contemporary view of retroactivity.

But there is also that second aspect above mentioned, in regard to the problem of exactly how, procedurally, this retroactivity philosophy of the Court should be administered in each particular situation generated by a new overruling decision. Specifically, what we mean concerning this apparently abstruse second aspect of the retroactivity problem is, that while it was evidently "in the cards" for *Katz* to be held non-retroactive in principle, why was it inevitable also that this non-retroactivity principle for *Katz* should be accompanied also by the "all out" *Stovall* rule of *absolute* prospectivity, for everyone except Mr. *Katz* himself? And it is on this second aspect that

we respectfully perceive a deeper level of the "retroactivity" problem as such, and as applied to our case:

As above mentioned, at the time *Katz* was decided the indicatively applicable procedure-choice for administering any non-retroactivity of *Katz* was the *Linkletter* Fourth Amendment procedure-choice by which non-retroactivity still left unhurt (that is, benefited) those parties whose cases were then subject to or pending on direct review. This indicatively applicable *Linkletter* Fourth Amendment procedure remained viable down until the moment our Fourth Amendment case was decided on March 24, when we were "given" *Stovall* (not a Fourth Amendment case) instead of *Linkletter*. Now, if non-retroactivity, or if "all out" prospectivity, is to be sauce for the goose, why should it not also be sauce for the gander? Why should not the tacking-on of *Stovall* onto the *Katz* non-retroactivity principle of *Desist*, operate purely prospectively for all persons except Mr. *Desist* and his fellow petitioners herein? For, again, the pre-existing indicatively applicable procedural principle for administering non-retroactivity in the Fourth Amendment area was *Linkletter*, not *Stovall*; the first time *Stovall* was declared applicable to the Fourth Amendment area was in our case on March 24, 1969. In this era in which the Court is favoring so strongly a doctrine of prospectivity purism in administering non-retroactivity, does not consistency (not to say simple fairness) require that this procedural purism live up to its declared doctrinal aspirations with a true and unvarying purism? If the *Stovall* procedure for administering Fourth Amendment non-retroactivity of *Katz* is what the Court deems wise, and if that *Stovall* choice necessarily imports (as we contend) an over-ruling of the indicatively pre-existing rule (*Linkletter*), how can it be justified to make this over-ruling of *Linkletter*

retroactive? Under present doctrine all over-rulings where retroactivity in principle is not allowed are supposed to operate according to the purest concept of prospectivity, except for the successful party in the over-ruling case. Why, then, should not the indicated over-ruling of the *Linkletter* procedure in our case, in favor of the *Stovall* procedure, likewise be made prospective *except for the successful parties (our within petitioners) in the over-ruling decision (the decision herein of March 24, 1969)?* We submit that this perhaps intricate, but we think inescapable, analytical feature of the "retroactivity" thinking that has gone into the decision of our case, may have escaped the Court's attention, and should now be considered in a re-hearing of our case—irrespective of whether there is going to be that larger re-thinking of retroactivity which we mentioned earlier and which Mr. Justice Harlan has invited in his words. "‘Retroactivity’ must be rethought".

IV.

At p. 8 of the slip opinion herein, *per* Mr. Justice Stewart, it is stated:

"* * * Moreover, the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weigly burden on any Court. * * *"

The above quoted statement of the Court is not applicable to our case. For, as we noted at p. 70 of our main brief on the merits herein, "if *Katz* applies to us, the record in our case is such that no remand would be needed for further exploration of the constitutional facts, and the Government has in effect so conceded in this case * * *"

V.

In the last paragraph of footnote 2 of Mr. Justice Stewart's opinion for the Court herein, slip op., p. 2, the Court rejects our contention that in the Waldorf Astoria bugging the air space between the doors acted as a sound chamber and that the installation was therefore equivalent to a physical penetration of petitioner Nebbia's hotel room. The Court states that it is unable to distinguish this eavesdropping from that condoned in *Goldman v. United States*, 316 U. S. 129, "where the agents simply placed a sensitive receiver against the partition wall". However, the science of electronic eavesdropping in *April 1937* when the Goldman eavesdropping was done (*United States v. Goldman*, 118 F. 2d 310, 313 (C. C. A. 2, 1941)), or indeed in *April 1942* when this Court decided the *Goldman* case, was a far different and lesser science from what it had become by the time of the sophisticated electronic procedures employed in our case (*December 1965*). We respectfully ask the Court to ponder whether its rejection of our detailed showing of the "parabolic mike" nature of the Waldorf installation in our case can rightly and fairly be disposed of solely on the anachronistic "authority" of *Goldman* (see our main brief on the merits herein, Point II).

VI.

Petitioners respectfully make special request addressed to Mr. Justice Black: Mr. Justice Black concurred in the affirmance of the judgment of conviction in this case "for the reasons stated in his dissenting opinion in *Katz v. United States*, 389 U. S. 347, 364 (1967)", also stating that he did this "while adhering to his dissent in *Linkletter v. Walker*, 381 U. S. 618, 640 (1965)" (slip op., at conclusion of opinion for the Court *per* Mr. Justice

Stewart, p. 11). Particularly in view of Mr. Justice Harlan's signalling call, as we above ventured to characterize it, that "'Retroactivity' must be rethought", we respectfully urge Mr. Justice Black to reconsider his conclusion in this case by giving renewed adherence to his *Linkletter* position *via* a vote for re-hearing in our case. If the re-thinking of retroactivity invited by Mr. Justice Harlan should come to pass, Mr. Justice Black's dissenting position in *Linkletter* would receive *de novo* consideration by the entire Court. That such *de novo* consideration is by no means an unrealistic prospect, is denoted by the very fact that Mr. Justice Harlan himself has now announced his own reconsideration of his *former* position in which he sided with the *Linkletter* majority (and with the majority in the post-*Linkletter* cases) on the retroactivity issue. We respectfully urge Mr. Justice Black to take into account that, even though he does not approve of the *Katz* principle as such, each individual Justice may, when he deems it proper, accept as decisionally binding upon himself (for purposes of concurrence rather than dissent in future cases) the *substantive* rulings of the Court with which he may have disagreed, and that each individual Justice, so accepting such a *substantive* ruling of the Court, may also properly continue to adhere to his own individual position on a *procedural* or otherwise collateral aspect touching the substantive principle with which he has disagreed. We are suggesting, in other words, that, particularly in view of the vigorous expressions of dissent in this case by Mr. Justice Harlan as well as by Mr. Justice Douglas and Mr. Justice Fortas, and in view of all of our foregoing arguments in this petition for re-hearing, Mr. Justice Black ought to consider voting for re-hearing herein on the basis of his *Linkletter* position and notwithstanding his *Katz* position.

CONCLUSION

It is respectfully prayed that this petition for re-hearing should be granted; that if the Court deems proper such rehearing should be scheduled for consideration together with the proceedings on the merits at the next Term in *United States v. White*, no. 124; and that if re-hearing is granted the petitioners may address themselves anew to all of the issues in this case without limitation or restriction, rather than being confined to the points presented in this petition for re-hearing.

Respectfully submitted,

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Certificate of Counsel

I certify that the foregoing petition for re-hearing is presented in good faith and not for delay, all petitioners being incarcerated serving their sentences, and no applications for bail being pending or contemplated in the present posture of the case.

ABRAHAM GLASSER,
Of Counsel for all Petitioners.

Dated: May 11, 1969.